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No. 08-327

Supreme Court, U.S.
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In The
# Supreme Court of the United States

STATE OF ARIZONA; TERRY GODDARD, Arizona Attorney General; PAUL CARTER, Assistant Attorney General; DORA B. SCHRIRO, Director Of The Arizona Department Of Corrections,

*Petitioners,*

vs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA; ROBERT V. TUZON,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Does the ruling of the Ninth Circuit Court of Appeals warrant review by this Court?

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## RULES AND STATUTES INVOLVED

In addition to the rule and statute appended to Petitioners' Petition for Writ of Certiorari, the following rules and statutory provisions are relevant to the Court's decision:

Rule 16(a), (b) and (c), Fed. R. Civ. P.:

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating settlement.

(b) Scheduling.

(1) Scheduling Order. Except in categories of actions exempted by local rule, the district judge – or a magistrate judge when authorized by local rule – must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.

(2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

(3) Contents of the Order.

(A) Required Contents. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) Permitted Contents. The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure or discovery of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;

(v) set dates for pretrial conferences and for trial; and

(vi) include other appropriate matters.

(4) Modifying a Schedule. A schedule may be modified only for good cause and with the judge's consent.

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) Attendance. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) Matters for Consideration. At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

Rule 83(b), Fed. R. Civ. P.:

(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

28 U.S.C. § 1915A(a) and (b):

(a) Screening. – The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil

action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal. – On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint –

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

## STATEMENT OF THE CASE

The question presented in this case is particularly undeserving of this Court's review. The scheduling order Petitioners seek to have reviewed and prohibited is simply not an issue worthy of this Court's attention: it is axiomatic that district courts have broad discretion to issue scheduling orders reasonably tailored to the pretrial needs of the district court to assess a particular type of case.

### A. Factual Background

When *pro se* prisoners file 42 U.S.C. § 1983 ("Section 1983") actions against penal institutions, their officers, employees and/or agents, the Tucson

division[1] of the District Court of Arizona sometimes issues a scheduling order (hereinafter the "Scheduling Order") which serves as an important case management tool for the district judge or magistrate judge assigned to the matter. The Scheduling Order generally requires defendants to review the subject matter of the complaint in order to ascertain the facts and circumstances underlying the complaint, and to consider whether any action can and should be taken by the institution or other appropriate officials to resolve the subject matter of the complaint.

The Scheduling Order also requires defendants to file a written report with the district court, which includes: an explanation of the actions described in the complaint; the results, if any, of the review undertaken by officials responsible for the institution; affidavits to support any facts alleged in the report; and copies of any documents pertaining to the administrative record. This process is particularly useful to the district and magistrate judges and their clerks when *pro se* prisoners allege that they are

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[1] The Phoenix division does not utilize the scheduling orders at issue in this matter. Petitioners attempt to demonstrate that this is a District-wide practice by citing orders from Phoenix division district judges, in which those judges deny state defendants' appeals from similar magistrate judge-issued scheduling orders. (Pet. Brief at 6). However, the magistrate judges who issued those scheduling orders all are from the Tucson division.

currently being denied medical treatment.[2] Information derived from defendants' investigation and reports can assist the district court in determining whether a prisoner is at risk of physical harm that could be prevented or alleviated by judicial intervention. Of course, the Scheduling Order also sets various deadlines for discovery and motion practice.

Rule 16(b), Fed. R. Civ. P. permits the Scheduling Order at issue by facilitating the various case management considerations specifically enumerated in Rule 16(a)-(c). Moreover, pursuant to Rule 83(b), district courts have the discretion to manage civil cases in any manner as long as it is consistent with federal law. *See* Fed. R. Civ. P. 83(b) ("A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules of the district.").

The Scheduling Order serves a variety of practical purposes with regard to the district court's evaluation and management of *pro se* prisoner cases. It is intended to give the district court a broader, more substantive overview of the case such that it may consider the numerous case management factors specified in Rule 16. *See* Fed. R. Civ. P. 16(a),(b),(c). As

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[2] In the case at bar, the plaintiff-prisoner asserted a claim for inadequate medical treatment before the district court issued a Scheduling Order. However, the district court eventually dismissed the medical treatment claim before the report required by the Scheduling Order was due to be filed.

such, the report requirement facilitates the numerous Rule 16 considerations of case management, which are particularly important in *pro se* prisoner cases. Such reports provide necessary information to the district court that allows it to issue subsequent orders appropriately managing the case by altering deadlines, holding conferences, requiring early dispositive motions, obtaining stipulations, and taking other appropriate actions to manage the pretrial stage of litigation.

Because the Tucson division's docket is heavily weighted with criminal cases as opposed to civil cases, Tucson division district judges and magistrate judges rarely have the opportunity or need to issue these Scheduling Orders. As reflected in the court's Electronic Case Filing system, during the years 2006 and 2007 (the time period relevant to this case), the Tucson division district judges issued a total of eighteen *pro se* prisoner scheduling orders. Of those, only five contained language similar to the scheduling order at issue in this case (i.e., language requiring defendants to conduct an investigation and file a report). In fact, among cases filed by *pro se* prisoner litigants during the years 2006, 2007 and 2008, the Tucson division district judges and magistrate judges issued only thirteen Scheduling Orders similar to the one at issue in this case.

Consistent with these statistics, very few *pro se* prisoner scheduling orders are issued each year because many *pro se* prisoner cases are screened and dismissed before active litigation (as required of

district court judges pursuant to the Prison Litigation Reform Act, specifically 42 U.S.C. § 1997e and 29 U.S.C. § 1915A). Also, the type of scheduling order issued varies by judge depending on the facts of the case and the individual judge's discretion. As a result, even including Tuzon's case in the above tallies, an average of fewer than five Scheduling Orders per year were issued between 2006 and 2008.

## B. Proceedings Below

On May 6, 2004, prisoner Robert Tuzon filed a complaint in the Tucson division of the District Court of Arizona, seeking relief under Section 1983. (Dkt. 1). On March 1, 2005, the District Court screened the complaint, granted Tuzon *in forma pauperis* status and directed that the complaint be served. (Dkt. 5). On January 17, 2006, Tuzon filed an amended complaint alleging damages in connection with an attack on Tuzon by other inmates, confiscation of Tuzon's legal documents by prison library staff, confiscation of Tuzon's money, and inadequate medical treatment. (Dkt. 16). On April 3, 2006, after screening the amended complaint, the district court dismissed certain claims and defendants without prejudice, and directed the remaining defendants to file answers to the remaining claims. (Dkt. 18).

After all answers were filed, the district court entered the Scheduling Order at issue on October 30, 2006. (Pet. App. B; Scheduling Order, Dkt. 43). Petitioners' response to the Scheduling Order was

due on January 12, 2007, but on November 6, 2006, Petitioners filed a Motion for Reconsideration regarding the issuance of the Scheduling Order, which the district court eventually denied. (Dkt. 44; Dkt. 48). Petitioners then filed a Motion to Stay enforcement of the Scheduling Order pending appeal, which the district court granted. (Dkt. 56; Dkt. 76).

On January 10, 2007, Petitioners filed a motion to dismiss all of Tuzon's claims, on the grounds that Tuzon had failed to exhaust his available administrative grievance procedures before filing suit. (Dkt. 55). In particular, as to Count I of the Amended Complaint, Petitioners initially argued that Tuzon submitted no inmate letter or grievance. *Id.* When Tuzon attached copies of his inmate letter, grievance, and appeal to the Director as exhibits to his response, Petitioners "conducted an investigation and now assert that Tuzon's grievance documents are genuine and that he submitted the documents to security officers assigned to his housing unit, but the documents were not forwarded to . . . [the] Grievance Coordinator." (Dkt. 76, at p. 4).

In addition, Petitioners initially alleged that Tuzon had not exhausted his remedies with regard to his allegation that he was denied eyeglasses, but Petitioners subsequently "acknowledge[d] that the grievance was filed under the wrong number and that the grievance log entry notes 'whole file missing.'" *Id.* at 10. On July 27, 2007, the district court granted in part and denied in part the motion to dismiss. *Id.*

Petitioners petitioned the Ninth Circuit for a writ of prohibition, pursuant to 28 U.S.C. § 1651(a), to prohibit the district court from enforcing portions of the Scheduling Order. In a *per curiam* opinion by Chief Judge Alex Kozinski and Circuit Judges Ronald Gould and Consuelo Callahan, the Ninth Circuit denied Petitioners' Petition for Writ of Prohibition, holding that the district court's issuance of the Scheduling Order was not clear error and that the Scheduling Order was indeed a permissible case assessment tool. The Ninth Circuit went on to note that due to the bungling of Petitioners' investigation of Tuzon's grievance file, the district court could have additionally concluded that, in this specific case, the Scheduling Order was appropriately used to create a comprehensive, substitute record. *In re Arizona*, 528 F.3d 652 (9th Cir. 2008).

## REASONS FOR DENYING PETITION

Several grounds for denying the Petition are discussed below. Included in that discussion, pursuant to Supreme Court Rule 15, Petitioners' misstatements of fact and law are identified and addressed as they arise.

## I. PETITIONERS' PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS HAVE RAISED NO ISSUE APPROPRIATE FOR A GRANT OF CERTIORARI.

### A. There Is Conformity Among the Circuits – Not a Circuit Split – In Approving the Use of Orders Similar to the Scheduling Order at Issue Here.

Petitioners do not attempt to argue, and could not argue, that another U.S. court of appeals has entered a decision in conflict with the Ninth Circuit's decision below. In fact, for more than thirty years, the Fifth and Tenth Circuits have explicitly recognized the utility of the type of reports required by the Scheduling Order (often called *Martinez* reports) and further affirmed the district courts' authority to request such reports. *See Martinez v. Aaron*, 570 F.2d 317 (10th Cir.1978) (*per curiam*); *Norton v. Dimazana*, 122 F.3d 286, 292 (5th Cir.1997); *Hardwick v. Ault*, 517 F.2d 295, 298 (5th Cir.1975).

Because there is complete uniformity among the circuit courts addressing the issue presented here, the Court should deny review of this matter.

### B. The Scheduling Order Does Not Conflict with the U.S. Constitution, Federal Statutes or Any Applicable Decisions of this Court.

Petitioners go to great lengths and are admittedly imaginative in their attempts to create a

conflict between the Scheduling Order's provisions and the Constitution, federal statutes or this Court's previous rulings. However, there is simply no substance to Petitioners' arguments as no such conflict exists.

### 1. Neither Petitioners' due process rights nor separation of powers principles are implicated by the Scheduling Order.

Petitioners make wholly unsupported, generalized allegations that the Scheduling Order somehow violates their constitutional due process rights or violates basic separation of powers principles.

#### a. Due process

Petitioners essentially claim that they have a liberty or property interest in the Federal Rules of Civil Procedure, and that the Scheduling Order flouts those rules by requiring disclosures in excess of those designated in Rule 26, Fed. R. Civ. P. Yet, Petitioners do not cite *any* case law to support that novel and peculiar argument. (Pet. Brief at p. 17-19). No constitutional due process issue exists here, despite Petitioners' specious attempts to create one.

#### b. Separation of powers

Petitioners claim that the Scheduling Order violates separation of powers and federalism principles

by "co-opting" members of the executive branch and requiring them to conduct an investigation. (Pet. Brief at p. 13-14). Applying Petitioners' flawed logic, each time a state governmental entity is a party to litigation, federalism and separation of powers principals would render the district court powerless to issue any number of case management and discovery orders.

Citing a handful of Supreme Court cases that purport to "[caution] the federal courts to stay out of the day-to-day administration of state prisons," Petitioners next claim that the Scheduling Order's requirements are both in conflict with the Constitution and this Court's previous rulings. (Pet. Brief at p. 14-17). But the cases cited by Petitioners involve lower courts entering judgments and/or granting injunctive relief with regard to prison administration and policies after an injury to inmates has been established. *See Procunier v. Martinez*, 416 U.S. 396 (1974), *overruled on other grounds*; *Lewis v. Casey*, 518 U.S. 343 (1996). For example, in *Procunier*, the district court enjoined enforcement of certain prison regulations on prison mail censorship, which the district court found to unconstitutionally limit the inmates' freedom of speech. *Procunier*, 416 U.S. 396. Notably, in that case, this Court affirmed the district court's intervention. *Id.*

In *Lewis*, the district court, after finding injury to inmates, entered an order "mandating detailed, systemwide changes" in a state's prison law libraries and legal assistance programs. *Lewis*, 518 U.S. at

343. This Court found that the district court "failed to accord adequate deference to the judgment of the prison authorities" in significant respects, including its determination justifying the state prison's restrictions on lockdown prisoners' access to law libraries. *Id.* at 361-62.

In stark contrast to the cases cited by Petitioners, the Scheduling Order at issue here is not a judgment, provides no injunctive relief and cannot be characterized as interfering with daily prison operations and regulations of the kind discussed in *Procunier* and *Lewis*. The Scheduling Order merely requires defendants to investigate complaints and produce information to the district court as part of a pending Section 1983 civil rights action. Thus, the cited cases are completely inapplicable to the issue before the Court.

Again, Petitioners' arguments are illogical and founded both in misstatements of constitutional law and misapplication of this Court's previous rulings. Petitioners have therefore failed to identify any constitutional issue or conflict with Supreme Court precedence that could warrant review of the propriety of the Scheduling Order in this matter.

### 2. The Scheduling Order is not in conflict with any federal statute.

#### a. Rules Enabling Act (REA)

Petitioners erroneously argue that the Scheduling Order violates the Rules Enabling Act because

it conflicts with Fed. R. Civ. P. Rule 26(a)(1)'s exemption for service of disclosure statements in *pro se* prisoner litigation. *See* Rule 26(a)(1)(B)(iv), Fed. R. Civ. P.[3] The Scheduling Order, however, does not conflict in any way with Rule 26(a)(1) because it does not require Petitioners to produce Rule 26(a)(1) disclosures. Moreover, Rule 26(a)(1) disclosure statements are not filed with the district court and instead are transmitted only to the other parties to a given action. In contrast, the information required by the Scheduling Order must be provided directly to the district court, with a copy to the plaintiff/prisoner.

The information submitted to the district court pursuant to the Scheduling Order further cannot be classified as a disclosure statement because the purpose of the information is to serve as an important case management tool for the district judge or magistrate judge assigned to the matter. Armed with a broader, more substantive overview of the case, the district court may then consider the numerous case management factors specified in Rule 16. *See* Fed. R. Civ. P. 16(a),(b),(c).

Though Petitioners, tellingly, do not reference Rule 16 in their Petition, Rule 16 authorizes the

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[3] Petitioners' Petition for Writ of Certiorari, and documents filed in the courts below, reference the exemption as subsection (E)(iv) of Rule 26(a)(1), but that subsection was renumbered to (B)(iv) when the Federal Rules of Civil Procedure were revised effective January 1, 2009. The text of the subsection at issue was not otherwise altered.

issuance of this type of Scheduling Order. *See* Rule 16(b)(3)(B)(vi), Fed. R. Civ. P.[4] (scheduling order may "include other appropriate matters"). Rule 83(b) further provides that district courts have the discretion to manage civil cases in any manner as long as it is consistent with federal law. Because the Federal Rules of Civil Procedure effectively authorize the Scheduling Order, such orders do not violate the Rules Enabling Act, and Petitioners have failed to demonstrate a conflict between the Scheduling Order and federal law.

Petitioners also argue that the Scheduling Order overreaches by improperly and unfairly requiring non-parties to investigate the plaintiff's complaint. (Pet. Brief at p. 13, 16, 18). This argument ignores the everyday realities of civil litigation. Under Petitioners' logic, each time an entity is a party to civil litigation, a district court would not have the authority to enforce any rules or orders that would require action by individuals employed by or associated with the entity, but not named as parties. It is axiomatic that when a business is sued for anything from employment discrimination to patent infringement, non-parties such as human resources

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[4] The pleadings Petitioners and the district court filed in the proceedings below reference the Rule 16 provision as Rule 16(b)(8), but that subsection was renumbered to 16(b)(3)(B)(vi) when the Federal Rules of Civil Procedure were revised effective January 1, 2009. The text of the subsection at issue was not substantially altered. Rule 16(b)(8) previously read "any other matters appropriate in the circumstances of the case."

representatives and engineers must assist in preparing documents and responses to any number of litigation-related items. A district court may order, or the Federal Rules of Civil Procedure may require, that parties respond to discovery requests or produce pre-trial statements, and just because the individuals contributing to those documents are not named as parties does not alleviate the entity's obligation to comply with the rules and court orders.

**b. Prison Litigation Reform Act (PLRA)**

Petitioners substantially misstate the law, as well as the facts of the current case, by arguing that the Scheduling Order abrogates or is inconsistent with the PLRA's administrative exhaustion requirement. *See* 42 U.S.C. § 1997. The Scheduling Order does not in any way hinder – let alone bar – defendants in a Section 1983 prisoner suit from seeking dismissal based on a prisoner's failure to exhaust administrative remedies, as specifically authorized by the PLRA. Nor does the order give any prisoner an "unauthorized second chance" to "seek prison review of his grievances." (Pet. Brief at p. 12). Indeed, defendants named in such lawsuits are free to file dispositive motions prior to answering the complaint or before fulfilling the Scheduling Order, asserting that the plaintiff-prisoner failed to exhaust administrative remedies prior to suit. If such a dispositive motion is successful, no Scheduling Order would issue, or if one had already issued, then those

successful defendants certainly would not need to prepare a "*Martinez* report."

In the case at bar, the defendants elected to answer the complaint before filing a dispositive motion. Consequently, the Scheduling Order issued and the defendants later filed a motion to dismiss based on Tuzon's alleged failure to exhaust his administrative remedies. The district court partially granted that motion and dismissed some of Tuzon's claims based on the PLRA's exhaustion requirement; thus, defendants did not have to investigate or provide a report regarding those claims which Tuzon had failed to grieve within the penal system. However, as discussed above, the district court denied the motion to dismiss in part because the motion practice revealed that defendants had misplaced Tuzon's other grievance filings. The Petition conveniently omits this fact, which related directly to the PLRA's administrative exhaustion requirement and the Petitioners' substantial and admitted mishandling of some of Tuzon's grievances.

Petitioners' argument on this issue not only misstates the facts and the law, but also is intellectually dishonest. Petitioners made a similar (albeit unsuccessful) argument below regarding the Scheduling Order's purportedly adverse effect on Petitioners' ability to assert a qualified immunity defense in a dispositive motion. The Ninth Circuit chastised Petitioners for their faulty reasoning, stating "it is factually inaccurate to allege that the [scheduling] order, rather than petitioners' trial strategy,

forecloses the benefits of their immunity defense." *In re Arizona*, 528 F.3d 652, 659 (9th Cir. 2008). It is likewise factually inaccurate for Petitioners to claim that the Scheduling Order limits or precludes their rights under the PLRA.

### C. The Ninth Circuit Has Not Decided an Important Question of Federal Law that Should be Settled by This Court.

As discussed above, the Scheduling Order's provisions do not conflict with any constitutional provision or federal statute. A district court's discretion to issue a scheduling order and weigh case management issues is simply not an issue that warrants the attention of this Court.

## II. BECAUSE THE SCHEDULING ORDERS ARE ISSUED IN FEWER THAN FIVE *PRO SE* PRISONER CASES PER YEAR, THE QUESTION PETITIONERS WANT ADDRESSED WILL RARELY ARISE.

The infrequent manner in which these scheduling orders are issued provides still more grounds for denying the Petition. As set forth above, only magistrate judges and district judges in the Tucson division of the District Court of Arizona utilize the scheduling orders in select *pro se* prisoner litigation matters. In fact, in 2006, 2007 and 2008 combined, the Tucson division issued only thirteen scheduling orders similar to the one at issue in this case.

Including Tuzon's case, on average, fewer than five scheduling orders are issued each year. Because the question Petitioners want the Court to address will so rarely arise, a writ of certiorari is not appropriate in this case.

## III. THE PETITION SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT CORRECTLY RULED THAT THE SCHEDULING ORDER WAS NOT CLEAR ERROR.

Though the Court has no reason to consider the issues raised in the lower court decisions, further grounds for denial of review lie in the fact that the Ninth Circuit's position – that the Scheduling Order was not clear error and a writ of prohibition should not issue – is correct.

The Ninth Circuit held that the Scheduling Order requiring the Petitioners to produce a report to the district court was warranted under the circumstances of the case. *In re Arizona*, 528 F.3d 652. The Ninth Circuit approved of the Scheduling Order, and its attendant "*Martinez* report" requirement, on several grounds.

First, the court recognized that Rule 16 "vests the district court with early control over cases 'toward a process of judicial management that embraces the entire pretrial phase, especially motions and discovery.'" *Id.* at 657 (citing Rule 16(a), Fed. R. Civ. P.). Second, the Ninth Circuit held that the Scheduling Order was a proper exercise of the district court's

discretion to control discovery in Section 1983 *pro se* prisoner actions, especially in this case when utilized after the district court "identified defects in the administrative record," based on Petitioners' mishandling of Tuzon's grievances. *Id.* at 658. At the point when the district court discovered that defect, a *Martinez* report was necessary to determine whether the case involved "an important complicated constitutional issue" affecting additional prisoners. *Id.*

The Ninth Circuit also properly refuted Petitioners' argument that the Scheduling Order constituted impermissible injunctive relief. The court reasoned that Petitioners made no showing that the order's requirements interfered with daily prison administration, as was the concern in *Lewis v. Casey*. 528 F.3d at 658. The Ninth Circuit declined to speculate further on this issue because Petitioners provided "no information about the amount or kind of additional work" the Petitioners and non-parties would have to perform "in order to comply with the terms of the order, as opposed to the amount and kind of work they would ordinarily perform for any other prisoner lawsuit or the work they have already performed for this case." *Id.*

The Ninth Circuit also found no merit in Petitioners' arguments that the Scheduling Order denied them the use of a qualified immunity defense, or that the order could require government counsel to violate ethical rules regarding adverse representation. Because the Ninth Circuit's decision is correct, the Petition should be denied.

Finally, certiorari rarely should be granted when the error alleged by a petitioner "consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. In this case, even if Petitioners could demonstrate that the Ninth Circuit misapplied the rule of law by finding that the Scheduling Order was not clear error, certiorari would still be inappropriate because the Ninth Circuit properly stated the rule of law, i.e., the standard for issuance of a writ of prohibition.

## CONCLUSION

Petitioners' Petition for Writ of Certiorari should be denied because Petitioners have raised no issue appropriate for a grant of certiorari.

Respectfully submitted,

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Dated: May 22, 2009